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Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, Appellant,

vs.

THE CITY OF PEORIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF APPELLANT

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(19367)

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This is an appeal from a decree entered by the Circuit Court for the Northern District of Illinois, Southern Division.

The bill of complaint in this case based the jurisdiction of the court upon a constitutional question, and the decree of the court below having denied to the complainant the relief sought, the appeal is brought directly to this court as involving a federal question.

Complainant, the Peoria Gas and Electric Company, in 1899 obtained from the City of Peoria, a municipal

corporation under the general laws of Illinois, a franchise ordinance permitting it to establish and operate a gas plant. This ordinance was granted under powers delegated by the state to municipalities. (Clause 13, Art. V, Chapter 24, Revised Statutes of Illinois.) The ordinance was accepted in writing by the Peoria Gas and Electric Company; a bond was filed under its provisions, and it became a binding contract between the corporation and the municipality.

In the year 1900 the Common Council of the City of Peoria, acting under the same delegation of authority by the state, passed an ordinance fixing the maximum price of gas at 75 cents per 1,000 cubit feet, which ordinance contained penal clauses and other provisions deemed to be unlawful and unreasonable.

Complainant thereupon filed its bill in chancery, praying for an injunction against the City of Peoria to restrain the enforcement of the last mentioned ordinance.

The bill alleged that the controversy presented a federal question—

1st. Because the attempt of the city council to fix the maximum price at which complainant should sell its product was an attempt on the part of the municipality by state authority to violate the contract created by the franchise ordinance of 1899.

2d. Because the maximum price fixed by the ordinance in question was so unreasonably low that the enforcement of the ordinance would result in the confiscation of the property of the complainant company

without due process of law and a violation of the Fourteenth Amendment.

The answer of the municipality asserted that the ordinance fixing the price was passed under delegated authority and was the act of the state; that the price fixed was reasonable, and that whether reasonable or not, the complainant was estopped from denying the reasonableness of the price so fixed.

A preliminary injunction was granted, issue was joined and the case was referred by agreement of the parties to a special master, to take proof and report his conclusions.

After 2,000 pages of evidence were taken, the case was fully argued before the master and the master filed his report, finding—

1st. That the ordinance fixing the price was passed under legislative authority.

2d. That the price fixed was so unreasonably low, that its enforcement would result in the confiscation of complainant's property.

3rd. That there was no merit in defendant's contention based on estoppel, and

4th, that the complainant was entitled to the relief prayed in the bill.

Exceptions were filed to the master's report and argued before the Hon. J. Otis Humphrey, District Judge, then sitting as Circuit Judge for the Northern District of Illinois, Southern Division.

The case was taken under advisement and in due sea-

son the court rendered an opinion to the effect that it appeared to him from the evidence that the complainant had violated the anti-trust laws of the State of Illinois, and that therefore it had no standing in a court of equity for the protection of its property or other rights and the court directed that the bill should be dismissed *without a determination by the court of any of the issues raised by the pleadings.*

A decree was entered in the form directed by the court and an appeal taken therefrom to this court.

The Bill of Complaint as Amended.

The *bill of complaint* (Rec. 4-20) alleges that the charter of the complainant company authorized it to construct and operate gas works; that the city of Peoria in 1899 granted to it an ordinance franchise permitting it to construct and operate a gas plant and lay mains along certain streets, etc. The franchise ordinance, set forth in full in the bill of complaint, provided, among other things, that the complainant should file a bond in the sum of $1,000, as indemnity against negligence during construction; that the work under the ordinance should begin within six months and be completed within eighteen months from the date of acceptance of the ordinance; that $5,000 in cash should be deposited with the treasurer of the city, to insure prompt work under the ordinance; and that the ordinance should take effect from and after its passage and the *acceptance* thereof by the company and the *filing* and *approval* of the bond therein required.

The bill sets forth *verbatim* the *agreement of acceptance* executed by the company through its proper officers and under its corporate seal. It alleges the filing of the bond, the deposit of the $5,000 in cash and the compliance on the part of the Gas Company with all the conditions of the ordinance; and alleges that by reason of such acceptance and compliance the same became a *binding contract between the city and the Gas Company.*

The bill of complaint sets forth (Rec., 17) the ordinance passed by the city council in 1900 fixing the maximum price of gas at 75 cents per 1,000 cubic feet and containing other provisions, among which may be noted a requirement that such gas so furnished shall afford "a light of not less than 18 candle power, to be measured and ascertained *at the place of consumption* in said city;" also a provision that any corporation charging more than 75 cents per 1,000 cubic feet, or which shall furnish gas of less than 18 candle power, shall be subject to a penalty of not less than $25 nor more than $200 for each and every offense; also a provision that any corporation refusing to furnish such gas at the price named shall be subject to a penalty of not less than $25 nor more than $200 for each and every refusal, and containing a further provision that "*all ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.*"

The bill of complaint denies the right of defendant to pass an unreasonable ordinance—which denial is explained and modified by the subsequent amendment of the bill.

The bill further alleges (Rec., 18, 19) that for the

reasons stated the price ordinance is an attempt to impair the rights of contract between complainant and the city; that it is an attempt to take private property for public use without just compensation; that its enforcement will deprive complainant of its property without due process of law and will deny to complainant the equal protection of the law in violation of the Constitution of the United States.

In support of the federal questions raised, the bill further alleges that the penalties provided in the price ordinance are unreasonable and unauthorized; that it is impossible, for reasons stated specifically, to furnish gas of a uniform 18 candle power at the point of consumption; that the ordinance was passed without investigation as to the cost of gas, and, finally, that the rate fixed in the price ordinance is so unreasonably low that its enforcement will bring ruin and destruction to the property and business of complainant, representing an investment of $450,000; that complainant can not manufacture and deliver gas to consumers of the quality manufactured by it, or of the quality required by the ordinance, at the price fixed by the ordinance, and that such price is so unreasonably low that complainant, if compelled to comply with said ordinance, will be unable to meet its fixed charges and expenses, its property will be confiscated and it will be rendered insolvent.

The bill contains apt allegations showing that by reason of the penal provisions of the price ordinance its enforcement would result in a multiplicity of suits and

that the case presented is a proper one for equitable relief.

The bill of complaint concludes with a prayer for a preliminary injunction against the enforcement of the price ordinance, and prays that upon final hearing the said ordinance may be adjudged invalid, null and void, and that the municipality and its officers may be permanently enjoined from enforcing the same against complainant; and for general relief.

The *amendment* to the bill of complaint (Rec, 32, 33) eliminated the paragraph of said bill in which it had denied the right of the city to pass the ordinance and inserted in lieu of such paragraph an allegation that the city council had passed the said price ordinance under the authority granted to the city by the legislature contained in Clause 13, Sec. 1, Art. V, Chap. 24, of the Revised Statutes of Illinois, relating to the powers of cities and villages, being the provision of the statute under which the original franchise ordinance was granted. The amendment then alleges that the city also claims the power to pass the price ordinance under the police powers delegated to municipalities by the legislature. (Clause 66, sec. 2, Art. V., chap. 24, Revised Statutes.) The amendment then alleges that the act of the legislature under whic. the original franchise ordinance was passed and under which the price ordinance was adopted does not authorize a municipality to pass *such* an ordinance as the price ordinance in question, for the reason that said ordinance would have the effect to impair the rights of complainant under said original fran-

chise ordinance, *the same being a contract* entered into and existing under state authority. The amendment further alleges that the said price ordinance in its operation would deprive complainant of its property without due process of law, and in effect would deny to complainant the equal protection of the laws, in violation of the provisions of the Constitution of the United States.

The Answer.

The answer of the municipality (Rec., 21–29) admits the allegations of the bill with respect to the granting of the franchise ordinance, its acceptance by the complainant, the expenditure of large sums of money under the terms thereof, and "*that it substantially complied with the terms and provisions of said ordinance on its part to be kept and performed as alleged in said bill.*"

The answer then avers that prior to the time that the complainant obtained its franchise ordinance another gas company was manufacturing and selling gas to the City of Peoria and its inhabitants, which gas company, for convenience, may be designated "the old company."

The answer avers that prior to the passage of the franchise ordinance the promoters of the new company made sundry representations to the citizens of Peoria and to the members of the city council to the effect that if a franchise ordinance was granted to the complainant, it would enter into *bona fide* competition with the old company and the price of gas would be materially reduced.

The answer further avers that after the franchise or-

dinance was granted, bitter competition ensued, and at one time the price reached the low point of 30 cents per 1,000 cubic feet.

The answer then avers that shortly before the passage of the price ordinance both corporations agreed that they would no longer compete for the sale and delivery of gas, and thereupon fixed the price at $1.15 net for light and 75 cents net for fuel, and the answer charges that such agreement was "in direct *violation* of the *representations* and agreements of said Peoria Gas and Electric Company with the citizens of said City of Peoria and the common council of said city when said ordinance was obtained, and by virtue of which, said ordinance and the franchises thereunder were granted to the Peoria Gas and Electric Company, and that said Peoria Gas and Electric Company, by reason of its deceptive promises and false and fraudulent representations, was enabled to obtain the right of way and lay down its pipes in the streets," etc. (Rec., 27).

The answer avers that said price ordinance was passed in good faith by the common council under its delegated powers (Rec., 28), and in the belief that it had the power to pass ordinances for the promotion of the welfare of the inhabitants of said city, and to prevent acts of oppression, injustice and extortion from being practiced against said inhabitants.

The answer denies that the rate fixed by the price ordinance is unreasonable, and avers in effect that, even though unreasonable, complainant *is estopped* from pleading such fact.

The answer further avers that no sufficient reason exists for the interposition of a court of equity, and prays that the bill be dismissed.

Replication and Order of Reference.

A replication was duly filed to the answer and thereafter the following order was entered in said cause (Rec., 38):

> "Now come the parties, by their solicitors, and by agreement in open court it is hereby ordered that Mr. I. C. Pinckney, of the City of Peoria, in said district and division, be and he is hereby appointed a special commissioner, to take the proofs herein and report the same, with his findings and conclusions herein, with all convenient speed."

Pursuant to the order of reference, more than two thousand pages of testimony were taken in the case during a period of more than a year, and the case was argued before the special commissioner appointed by agreement of the parties.

Special Commissioner's Report.

The special commissioner filed his report, containing twenty-six findings of fact and twenty-five conclusions of law.

The findings of the special commissioner fully sustained the contentions of complainant on all points necessary to the relief sought. These findings are substantially set forth on p. 58 *et seq.*

The Action of the Court.

Notwithstanding the elaborate findings of the master and the efforts of both parties to obtain a decision on the merits, the court, of its own motion, found that the complainant had violated the anti-trust statutes of the State of Illinois and therefore declined to pass on the issues raised by the pleadings. (Rec., 139, 143.)

It is proper to here note that *the question of whether or not the complainant had violated the anti-trust laws of the State of Illinois was not raised by the pleadings in this case; that no findings of the master were predicated thereon*, and that *none of the exceptions filed* to the master's report *specifically mentioned the said anti-trust laws of the State of Illinois or requested findings relating thereto.*

The Opinion of the Court.

The opinion of the court is as follows (Rec., 139):

> "This matter comes up on exceptions to the master's report. I believe both complainant and defendant have filed exceptions to certain affirmative holdings of the master, and both parties have also filed exceptions because the master failed to hold—omittted to hold—upon certain other questions. Without undertaking to specify the facts about this long list of exceptions, this record shows that complainant's bill was filed on September 18, 1900, seeking to enjoin the enforcement of an ordinance of the City of Peoria fixing the maximum rate for gas, which ordinance had been passed on the 4th day of the same month—September, 1900.

"The bill avers that the city council had no power to pass the ordinance; that the rate as fixed by the ordinance is unreasonably low; that its enforcement would deprive the complainant of its property without due process of law, and would deny to complainant the equal protection of the laws, thus raising a federal question on the Fourteenth Amendment to the Constitution of the United States. The answer of the city avers that the complainant has entered into an illegal combination or understanding with the old gas company; second, that whether that be so or not, the complainant is estopped to deny the the validity of this ordinance or the reasonableness of this rate by certain acts of its own at the time its franchise ordinance was passed; third, that the city council had power to pass the ordinance in question; and fourth, that the rate fixed was a reasonable one. I am of the opinion that the averment of the answer which I have first mentioned has been so fully proven by this record that it must be conclusive of the case. The Illinois anti-trust law, as construed by the Supreme Court of Illinois, leaves no doubt in my mind that this record shows, on the part of this complainant, a violation of that act. The manipulation of the stock of both companies, the use of the mains of both companies, the performing by complainant's servants of the business of both companies, the simultaneous agreement of rates between the officers of both companies, and the contract in evidence between the two companies,—all lead to the inevitable conclusion that there was an understanding between complainant and the old company such as the Illinois act prohibits. A court of equity will not assist complainant to reap the fruits of such unlawful combination. The exception on the part of

the city to that part of the master's report which omits to find in accordance with this view will be sustained, and I need not enlarge upon the other numerous questions raised by this record. The bill will be dismissed at complainant's costs. Counsel for the city may prepare the order."

Decree.

Subsequently a decree was entered, finding, among other things, that "the complainant unlawfully entered into a combination agreement or understanding with the Peoria Gas Light and Coke Company * * * to regulate or fix the price at which gas should be furnished people and citizens of the defendant, the City of Peoria, by the complainant, and the said Peoria Gas Light and Coke Company, contrary to and in violation of the *statutes of the State of Illinois, approved June 11, 1891, and in force July 1, 1891*; and that the complainant is therefore, without equity and that the injunction heretofore issued in this cause should be dissolved." (Rec., 142.) (Italics not in decree.)

Thereafter, in accordance with the provisions of the decree, a bond in the sum of $150,000 was filed by the complainant and an appeal perfected to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in dismissing complainant's bill of complaint as amended, in manner and form as shown by the record of said suit and proceedings.
2. The court erred in refusing to grant the complainant the relief asked and prayed for in and by said com-

plainant's bill of complaint as amended and in not entering a decree in favor of complainant in accordance with the prayer therein.

3. The court erred in rendering its opinion and in finding therein that complainant was not entitled to equitable relief. (Opinion rendered February 8, 1904, and filed March 24, 1904.)

4. The court erred in holding in his said opinion as follows:

> "The Illinois anti-trust law, as construed by the Supreme Court of Illinois, leaves no doubt in my mind that this record shows on the part of this complainant a violation of that act in the manipulation of the stock of both companies, the use of the mains of both companies, the performing by complainant's servants of the business of both companies, the simultaneous agreement of rates between the officers of both companies, and the contract in evidence between the two companies, all lead to the inevitable conclusion that there was an understanding between complainant and the old company, such as the Illinois act prohibits. A court of equity will not assist complainant to reap the fruits of such unlawful combination. The exception on the part of the city to that part of the master's report which omits to find in accordance with these views will be sustained."

The court erred because—

a. Said anti-trust act of the State of Illinois was not applicable to the case under the pleadings, nor raised thereby.

b. If so applicable said anti-trust act is in conflict with and in violation of the provisions of the Constitution of the United States and the amendments thereto.

c. Complainant was not attempting "to reap the fruits of such unlawful combination," or seeking to have any rights enforced which arose out of the same.

d. No exception was filed by defendant raising this question.

e. Such conclusion is not warranted by the evidence.

5. The court erred in making the order of February 9, 1904, in which he ordered, adjudged and decreed

> "That the exceptions made and filed herein on behalf of the defendant City of Peoria against the failure of the special master, I. C. Pinckney, to find in his report on file herein, that the complainant prior to the commencement of this suit had formed entered into and become a party to an illegal and unlawful combination, pool, trust, combination or agreement with the Peoria Gas Light and Coke Company (the old gas company), should be and the same is hereby sustained."

6. The court erred in holding in final decree

> "That the complainant unlawfully entered into a combination, agreement or understanding with the Peoria Gas Light and Coke Company * * * to regulate or fix the price at which gas should be furnished the people and citizens of the defendant, the City of Peoria, by the complainant, and said the Peoria Gas Light and Coke Company, contrary to and in violation of the statute of the State of Illi-

nois, approved June 11, 1891, and in force July 1, 1891."

for the following reasons:

a. Such statu was not pleaded in defendant's answer.

b. No evidence had been introduced or offered under the same.

c. It had not been made the basis of any of defendant's exceptions to the report of the special master.

d. It had not been considered by the court in rendering its opinion of February 8th, or in the order of the court following such opinion on February 9, 1904.

e. Such finding in the decree as was not warranted by the evidence.

f. The said alleged illegal agreement or combination was not properly a defense to complainant's bill as amended, wherein it sought to enjoin the defendant City of Peoria from enforcing an ordinance which would deprive complainant of its property and rights contrary to the provisions of the Federal Constitution.

7. The court erred in sustaining defendant's exceptions, or any of them, to the facts found by the special master (said master having been appointed by agreement of the parties), and in neglecting and refusing to confirm the said report except as to the 5th exception taken by complainant thereto, and in thereby denying to complainant the protection afforded it by the Constitution of the United States and the amendments thereto.

8. The court erred in not holding that the ordinance of the City of Peoria in controversy in this case is in conflict with and violation of the provisions of Section 10 of Article I of the Constitution of the United States, and of the Fourteenth Amendment thereto, in that by the said ordinance, as appears from the evidence and from the report and findings of the special master, the complainant is—*first*, deprived of property without due process of law; *second*, deprived of and denied the equal protection of the law; *third*, that its private property is taken thereby for public use without just compensation; and *fourth*, that said ordinance impaired the obligation of a prior contract between said company and the city.

9. And the court further erred in refusing and neglecting as a court of equity to take cognizance of the case as disclosed by complainant's bill of complaint as amended, the evidence in support thereof, and the report of the special master, and instead of so doing dismissing the complainant's bill.

10. The court erred in admitting any evidence (complainant having specifically objected thereto) touching the question of an alleged illegal combination or understanding between complainant and the Peoria Gas Light and Coke Company, as such controversy was and is wholly collateral to and in no manner connected with the case made and the relief sought by complainant's bill, or raised by the answer.

11. The court erred in refusing to grant the relief

prayed for in the complainant's bill of complaint as amended and ordering a dismissal of the same at the cost of complainant.

BRIEF.

The questions for discussion in this court naturally present themselves in the following order:

I. Jurisdiction of the Federal Court.

II. The Jurisdiction of the Supreme Court on Appeal.

III. Consideration of the Decision of the Court Below.

IV. Consideration of the Merits of the Case.

I.

THE JURISDICTION OF THE FEDERAL COURT.

The jurisdiction of the Circuit Court was based solely upon the ground that the suit was one arising under the Constitution of the United States.

The bill alleged that the maximum price ordinance passed by the City of Peoria under delegated powers was such that it *impaired the obligation of the franchise contract* theretofore entered into between the complainant and the City of Peoria; and the bill further alleged that the enforcement of the maximum price ordinance would result in the *taking of complainant's property without just compensation and would deprive complainant of its property without due process of law.*

WHERE THE BILL OF COMPLAINT SETS UP BY APT AVERMENT THAT A MUNICIPAL ORDINANCE (PASSED UNDER STATE AUTHORITY) IMPAIRS THE OBLIGATION OF A CONTRACT OR DEPRIVES COMPLAINANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, OR WITHOUT JUST COMPENSATION, OR DENIES TO COMPLAINANT THE EQUAL PROTECTION OF THE LAW, THERE IS PRESENTED A FEDERAL QUESTION OF WHICH THE FEDERAL COURT HAS JURISDICTION REGARDLESS OF CITIZENSHIP.

Joplin v. *Light Co.*, 191 U. S., 150.

City Ry. Co. v. *Citizens' Street Ry. Co.*, 166 U. S. 567.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

St. Paul Gas Light Co. v. *St. Paul*, 181 U. S., 142.

Vicksburg Water Works Co. v. *City of Vicksburg*, 185, U. S., 65.

City of Cleveland v. *Cleveland City Railway Company*, 194 U. S., 516.

Pacific Electric Co. v. *City of Los Angeles*, 194 U. S., 112.

This rule has been followed in numerous cases in the Circuit Courts and Circuit Courts of Appeals, some of which follow:

Los Angeles City Water Co. v. *City of Los Angeles*, 103 Fed., 711.

Haverhill Gas Light Co. v. *Barker*, 109 Fed., 094.

Cleveland Gas Light & Coke Co. v. *City of Cleveland*, 71 Fed., 610.

Indianapolis Gas Co. v. *City of Indianapolis*, 82 Fed., 245.

Mercantile Trust & Deposit Co. v. *Collins Park & Belt Ry. Co.*, 99 Fed., 812.

American Water Works & Guaranty Co. v. *Home Water Co.*, 115 Fed., 171.

Consolidated Water Co. v. *City of San Diego*, 93 Fed., 849.

Southwestern Missouri Light Co. v. *Joplin*, 101 Fed., 23.

Pacific Electric Co. v. *City of Los Angeles*, 118 Fed., 746.

1. THE FRANCHISE CONTRACT RELIED UPON BY COMPLAINANT.

In 1899 the City Council of the City of Peoria granted to complainant a franchise ordinance permitting it to construct and operate gas works within the City of Peoria, which said franchise ordinance is set forth in full in the bill of complaint. (Rec., 5–12.)

The franchise ordinance was passed under the powers delegated to municipalities by the Legislature of the State of Illinois, and contained in Clause 13, Section 1, Article V, chapter 24, of the Revised Statutes of Illinois, which reads as follows:

> "§ 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers: * * *
>
> "*Thirteenth*—To regulate the opening therein [in streets] for the laying of gas or water mains and pipes, and the building and repairing of sewers, tun-

nels and drains, and erecting gas lights, *Provided, however,* that any company heretofore organized under the general laws of this state or any association of persons organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

The ordinance franchise of 1899 not only granted to complainant the right to construct and operate gas works, but contained other provisions, which made it clearly a contract between the city and the company. It provided, among other things, that the complainant should file a bond in the sum of $1,000 as indemnity against negligence during construction; that the work under the ordinance should begin within six months and be completed within eighteen months from the date of the acceptance of the ordinance; that $5,000 in cash should be deposited with the treasurer of the city to insure prompt work under the ordinance; that the company should *from time to time extend its mains upon request of the city*; and that the ordinance should take effect from and after its passage and acceptance thereof by the company and the filing and approval of the bond therein required. A formal agreement of acceptance was duly executed by the company and filed with the city. The bond and indemnity required by the ordinance were filed and ap-

proved by the city, and the ordinance became a binding contract between the city and the company; on the faith of which the company expended $450,000.

The franchise ordinance in question contained no provision as to the price to be charged by the company for gas. In the absence of specific provision in that regard the law is that the company is presumed to have the power to fix a reasonable price for its product.

When a corporation is chartered under the general incorporation law with the right to manufacture and sell gas, the right to charge a reasonable price is a right implied, and one that forms part of the charter contract with the state, which can not be impaired by legislation.

New Memphis Gas Light Company v. *City of Memphis*, 72 Fed. Rep. 952.

Cleveland Gas Light & Coke Company v. *City of Cleveland*, 71 Fed. Rep., 610.

Capital City Gas & Light Co. v. *Des Moines*, 72 Fed. Rep., 818. 829

People ex rel. St. Louis v. *Laclede Gas Company*, 102 Mo., 479.

The company contends that by implication of law its franchise contract gave to it the power to fix a reasonable price for its product.

THE IMPAIRMENT OF THE CONTRACT.

In the year 1900 the City of Peoria passed the maximum rate ordinance, the enforcement of which this suit seeks to enjoin.

This maximum rate ordinance is as follows (Rec. p. 17):

"AN ORDINANCE REGULATING AND FIXING THE MAXIMUM PRICE OF GAS IN THE CITY OF PEORIA.

Be it Ordained by the City Council of the City of Peoria:

SECTION 1. That the maximum price of gas furnished the City of Peoria, and the citizens thereof, and all consumers of gas therein, shall not exceed the sum of seventy-five (75 cts.) cents per thousand cubic feet; such gas so furnished to afford a light of not less than eighteen (18) candle power, to be measured and ascertained at the place of consumption in said city, by the most modern appliances known to science, for measuring the candle power of illuminating gas; and the Peoria Gas Light and Coke Company, and the Peoria Gas and Electric Company, and any other company, corporation, person or persons who are now, may hereafter furnish gas to consumers in the City of Peoria, are hereby authorized and empowered to charge all consumers of gas in said city a sum not in excess of seventy-five (75 cts.) cents per thousand cubic feet.

SEC. 2. That any company, corporation, person or persons who shall, in violation of the provisions of the preceding section, charge or require the City of Peoria, or any citizen thereof, or any consumer of gas therein, to pay for gas furnished it or them, or either of them, a sum in excess of seventy-five cents (75 cts.) per thousand cubic feet, or who shall furnish to said City of Peoria, or any citizen thereof, gas less than eighteen (18) candle power, shall be subject to a penalty of not less than twenty-five ($25.00) dollars, nor more than two hundred ($200.00) dollars for each and every offense.

SEC. 3. That any company, corporation, person or persons who shall remove any meter or meters

from the house, store, factory or premises of any consumer of gas in the City of Peoria, against the will and consent of such consumer of gas who is willing to pay for gas furnished him, it or them by any company, corporation, person or persons, the price established and fixed in Section One (1) of this ordinance, shall be subject to a penalty of not less than twenty-five dollars, nor more than two hundred ($200.00) dollars for each and every offense; *Provided, however*, that any company, corporation, person or persons furnishing gas to consumers in the City of Peoria, shall have the right to remove any meter or meters for the purpose of repairing the same, on condition that such meter or meters so removed shall be replaced or a new one substituted in its place within twenty-four (24) hours of the time of removal of any such meter or meters.

SEC. 4. This ordinance shall be in force and effect from and after its passage and due publication, as provided by law: *Provided*, that nothing herein contained shall impair the obligation of any contract in existence between the City of Peoria and either of said gas companies above mentioned.

SEC. 5. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed, subject to the proviso contained in Section Four (4) of this ordinance.

Passed in council this fourth (4) day of September, A. D. 1900.

HENRY W. LYNCH, *Mayor.*

ATTEST:

ROBT. M. ORR, *City Clerk.*"

The Common Council of the City of Peoria in passing the maximum rate ordinance relied upon the powers dele-

gated to it by the State of Illinois under Clause 13, Section 1, Article V, Chapter 24, of the Revised Statutes of Illinois, already quoted, and also under the police powers delegated to municipalities by the Illinois Legislature. Subdivision 66 of Section 1, Article V, Chapter 24, which reads as follows:

> "To regulate the police of the city or village, and pass and enforce all necessary police ordinances."

So far as the power to pass said maximum price ordinance is predicated upon Clause 13, Section 1, Article V, the city must rely upon the *same delegation of power under which it passed the original franchise ordinance*, and in this view the validity of the maximum price ordinance requires—

(1) That the power to fix rates is a continuing power, irrespective of the price which may be fixed in the original franchise ordinance when granted; or

(2) That where the franchise ordinance fails specifically to fix the rate, the city retains the power to legislate in that regard, with the right to exercise such power at any time in the future; or

(3) That said Clause 13 of Section 1 of the Cities and Villages Act delegates to cities independent authority to reduce rates at the pleasure of the common council.

The complainant contends that the franchise ordinance of 1899 constituted a contract, and that after the acceptance of such franchise ordinance any attempt of the city

to fix the price at which the company's product should be sold impaired the obligation of the contract so existing between the city and the company.

City of Cleveland v. *Cleveland City Ry. Co.*, 194 U. S., 517.

The city undoubtedly had the right under the statute to place a price in the franchise ordinance when granted, and the company could then have elected whether to enter into the contract tendered at the rate named therein.

But the city named no rate in the contract ordinance, and the company thereupon entered into the contract, thereby covenanting to furnish gas at the rate implied by law, to wit, a reasonable one.

It is respectfully insisted that the city, by failing to name a price in the franchise ordinance, did in fact write into said ordinance "a reasonable price" as effectually as though the rate was specifically fixed, and that thereby *it exhausted its power to legislate further with respect to the contract in question, especially as the theory of a "continuing power would result in violation of contract rights."*

If the power of the common council to pass the maximum rate ordinance be predicated upon the Police Power delegated to municipalities by the Cities and Villages Act, the ordinance none the less impairs the obligation of the franchise contract.

An ordinance, when accepted and acted upon, becomes

a contract and can not be annulled or amended without the consent of both parties.

City Ry. Co. v. *Citizens' St. Ry. Co.*, 166 U. S. 557.

People ex rel. City of Pontiac v. *Central Union Telephone Co.*, 192 Ill., 307.

Chicago Municipal Gas Light Co. v. *Town of Lake*, 130 Ill., 42.

City of Belleville v. *Citizens' Horse Ry. Co.*, 152 Ill., 171.

2. The Taking of Complainant's Property for Public Use Without Just Compensation, and Without Due Process of Law.

If, in the judgment of the Court, the action of the common council in passing the maximum rate ordinance did not impair the contract rights of complainant, an examination of the record conclusively shows that the *enforcement* of the maximum rate ordinance would result in the taking of complainant's property for public use without just compensation, and in denying to complainant the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The bill of complaint alleges, and the master found, that the cost to complainant of manufacturing and distributing gas in the Peoria territory (exclusive of interest on moneys actually invested) is in excess of the sum of 75 cents per thousand cubic feet, the maximum rate fixed by the ordinance, and that the City of Peoria, in passing such ordinance, exercised its delegated power

unreasonably, imposing such regulation upon complainant as to compel it either to abandon its business of manufacturing and distributing gas in the City of Peoria (a course prohibited by the price ordinance) or to suffer financial loss and injury in continuing it. The bill alleges, and the master found, that in other respects the ordinance in question is unreasonable, and that complainant will be unable to comply therewith. (Rec., 57, finding 14; Rec., 51, finding 12; Rec., 61, finding 25.)

It follows, therefore, that, whether the action of the City of Peoria be challenged because the city sought unlawfully to impair the obligation of the contract, or whether it be challenged because the city sought under delegated authority to modify a contract, but passed an unreasonable ordinance with respect thereto, the Federal Court would in either event take jurisdiction.

> *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1. and cases cited in this brief, pp. 19, 20, 29.

3. The Right to Equitable Relief.

Upon well-settled principles of equity jurisdiction and the repeated utterances of this court, the bill upon its face is clearly cognizable in equity.

The penal provisions of the ordinance, coupled with the averment that more than 2,000 consumers are served (Rec., 16), fully support the allegations of the bi llin regard to "innumerable suits and a multiplicity of actions."

That a court of equity has jurisdiction to restrain the enforcement of a void ordinance where such relief will

prevent a multiplicity of suits and where there is no sufficient or adequate remedy at law for the protection of property, is established by abundant authority.

If an ordinance is invalid, as in contravention of complainant's constitutional rights, a federal court of equity alone can declare it void and afford to complainant the complete relief to which it is entitled.

Where a municipality threatens to, and, unless restrained by law, will enforce the penal provisions of such an ordinance, a court of equity has power to restrain it.

The avoidance of a multiplicity of suits to defend against penal actions likely to be brought by thousands of consumers is alone sufficient ground for equitable interference.

Anticipation of such illegal action by the city or its citizens is of itself sufficient.

Smyth v. *Ames*, 169 U. S., 466.
C., M. & St. P. Ry. Co. v. *Minnesota*, 134 U. S., 418.
Ry. Co. v. *Gill*, 156 U. S., 649.
Vicksburg Water Works Co. v. *City of Vicksburg*, 185 U. S., 65.
Haverhill Gas Light Co. v. *Barker*, 109 Fed., 694.
Capital City Gas Co. v. *Des Moines*, 72 Fed., 829.
City of Chicago v. *Collins et al.*, 175 Ill., 445.
City of Cleveland v. *Cleveland City Ry. Co.*, 194 U. S., 517.
Walla Walla v. *Walla Water Co.*, 172 U. S., 1.

II.

THE JURISDICTION OF THE SUPREME COURT ON APPEAL.

The bill of complaint, as amended, contained the proper allegations in legal and logical form and presented a controversy arising under the Constitution of the United States.

While the opinion of the court below did not pass upon the merits of the case, and the decree dismissed complainant's bill upon a point wholly collateral to the issues, such dismissal nevertheless operated to deny to complainant the constitutional rights invoked by the bill of complaint, and an appeal, therefore, was taken to this court under Section 5 of the Judiciary Act of 1891 (26 Stat., 826, 827), on the ground that the case was one in which a law of a state (*i. e.*, a municipal ordinance) was claimed to be in contravention of the Constitution of the United States, and that such ordinance impaired the obligation of the contract contained in complainant's franchise ordinance, and also resulted in the taking of complainant's property without just compensation and without due process of law.

The courts have repeatedly decided that, where the bill shows a suit which does really and substantially involve a right which depends upon the construction or application of the Federal Constitution, then, even though the decision of the case in the court below turned upon some other point, and that court did not decide the federal question involved, *such question, nevertheless, remains*

in the case, and an appeal therefrom goes properly to the Supreme Court, and not to the Circuit Court of Appeals. The case is, therefore, properly in this court on appeal, although the Circuit Court did not decide the federal question involved.

Davis & Farnum Mfg. Co., v. *City of Los Angeles*, 189 U. S., 207.

City of Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

Hugeley Mfg. Co. v. *Galeton Cotton Mills*, 184 U. S., 290.

Loeb v. *Columbia Township*, 179 U. S., 472.

American Sugar Refining Co., v. *New Orleans*, 181 U. S., 277.

City of Dawson v. *Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co.* (*C. C. A., 5th Cir.*), 102 Fed., 200.

Owensboro v. *Owensboro Water Works Co.*, (*C. C. A., 6th Cir.*), 115 Fed., 318.

Westerly v. *Westerly Water Works Co.* (*C. C. A.*) 76 Fed., 467.

Moreover, the case being properly in this court on appeal, the whole case is open for consideration and review.

Davis & Farnum Mfg. Co. v. *City of Los Angeles* 189 U. S., 207.

Horner v. *U. S.*, 143 U. S., 570.

Chappell v. *U. S.*, 160 U. S., 499.

City Ry. Co. v. *Citizens' R. R. Co.*, 166 U. S., 557.

Holder v. *Aultman*, 169 U. S., 81.

Penn Mutual Life Ins. Co. v. *Austin*, 168 U. S., 685.

III.
CONSIDERATION OF THE DECISION OF THE COURT.

THE COURT BELOW ERRED IN HIS FINDINGS OF FACT.

While the court below held as a matter of law that the complainant had no standing in a court of equity, this conclusion could only have been reached by reason of an erroneous interpretation of the evidence, and it is, therefore, desirable to examine the findings of fact in the Court's opinion before addressing ourselves to the law.

It is proper for this court on appeal to look to the opinion of the lower court when the same is made a part of the record to ascertain the grounds of the decision,

Loeb v. *Columbia Township*, 179 U. S., 472.

That portion of the opinion of the court covering his findings of fact is as follows (Rec., 139):

> "*The Illinois anti-trust law* as construed by the Supreme Court of Illinois, leaves no doubt in my mind that this record shows on the part of this complainant a violation of that act in the *manipulation of the stock of both companies, the use of the mains of both companies, the performance by complainant's servants of the business of both companies, the simultaneous agreement of rates between the officers of both companies, and the contract in evidence between the two companies*, all lead to the inevitable conclusion that there was an understanding between complainant and the old company such as the Illinois act prohibits. A court of equity will not assist complainant to reap the fruits of such unlawful combination." (Italics not in opinion.)

Let us consider the Court's findings of fact *seriatim*:—

a. As to "*the manipulation of the stock of both companies.*"

There is absolutely nothing whatsoever in the record pertaining to the capital stock of The Peoria Gas Light and Coke Company (the old company). It does not appear that the complainant owns a single share of stock of the old company. It does not appear that any stockholder of the complainant owns a single share of stock of the old company.

The court apparently based its findings upon the *supposed* contents of the voting-trust agreement entered into by stockholders of complainant only, but which defendant and the court evidently imagined was also participated in by stockholders of the old company. (Defendant's exceptions, 45–49; Rec., 92.)

It is pertinent to observe that the so-called voting-trust agreement was not in evidence, although it appears from the record that the agreement was produced in court; was examined by the special master, and was ruled out by the special master as irrelevant and immaterial. (Rec., 1563.) It was clearly within the province of the defendant to have secured an order from the court directing the admission of the voting-trust agreement as evidence, if the defendant believed it to be competent, material or relevant. Upon the argument before the court the pool agreement was again discussed, and it was the duty of the court to place the instrument in evidence if it proposed to pass upon its contents. And again the court did not see fit to make a part of the

record an instrument which the court *failed to examine, but upon the supposed contents of which the court based its opinion.*

Moreover, the record does disclose that *the complainant was not a party, either directly or indirectly,* to the so-called voting-trust agreement. (Rec., 1563.)

b. As to "*the use of the mains of both companies.*"

It appears from the evidence that one of the old company's mains, which supplied the service pipes of about a half dozen customers, had become unfit for use; that the patronage of the half dozen customers did not then warrant the relaying of the main; that the old company made an arrangement with the complainant by which, instead of laying a new pipe at that time, the service pipes of the half dozen customers were attached to the mains of the complainant; that the old company collected from its half dozen customers the same as before and paid the amount of those bills to the new company—not turning over even this half dozen customers to the new company. (Rec., 696, 697.)

It appears from the record that the new company has upwards of 26 miles of mains; that the old company has upwards of 59 miles of mains. It appears that the customers of the new company number nearly 2,500, and that the customers of the old company number about 4,500. And yet, despite the magnitude of the operations and the properties of both companies, they are, by the opinion of the court, found guilty of conspiracy because the complainant accorded to the old company a courtesy which affected 6 gas consumers out of a total of 7,000

and 1 block of main out of a total of 85 miles. If the doctrine of *de minimis non curat lex* has no application here, we submit that the general equitable doctrine of *fairness* should relieve the complainant from censure.

c. As to "*the performing by complainant's servants of the business of both companies.*"

This statement in the opinion will be considered under paragraph "**e**" below, as the only services performed by complainant's employes for the old company were those under the contract therein considered.

d. As to "*the simultaneous agreement of rates between the officers of both companies.*"

It appears from the evidence that after a period of ruinous competition, during which gas was sold by both companies at a price greatly below the cost of production, some of the officers of the companies met in Chicago and it was suggested that both companies had been losing money long enough and that such prices ought to be made as would at least cause such loss to cease. Parties present upon the occasion in question testified positively that the only representative of the old company present was Mr. McKinley, and that he left the conference before any agreement was reached; that thereafter the new company determined upon a proper price to be charged and the old company followed suit. The evidence demonstrates that the rate so made was entirely reasonable and proper, and there is nothing in the record which shows that there was any *agreement* whatsoever between the companies to charge the same price or to

maintain the price so made. *Moreover, as a matter of fact, the rates of the two companies did not remain the same except for a period of about 90 days.* (Rec., 1353.)

Apart from statutory prohibition, there is no law to forbid corporations, even those enjoying public service franchises, from conferring in regard to charges and fixing upon the same rates, provided the rates so fixed and established are in themselves reasonable to the public.

U. S. v. *Trans-Missouri Freight Association*, Circuit Court of Appeals, 8th Dist., 58 Fed. Rep., p. 58.

Manchester & Lawrence R. R. Co. v. *Concord R. R. Co.*, 66 N. H., 100; 20 At., 383.

e. As to "*the contract in evidence between the two companies.*"

It appears that upon October 24, 1901, the old gas company entered into a contract with complainant whereby complainant agreed to manufacture gas and deliver the same into the holder of the old company for a limited period of time, while the old company was completing repairs to its plant. It further appears that the plants of the two companies were adjoining and that gas was delivered by the new company into the holder of the old company without the exercise of any public franchise or the use of any public property.

Had it not been for the fact that there was a competing company, with a finely equipped plant, contiguous to the plant of the old company, the latter company

would undoubtedly have completed its repairs, at some inconvenience to itself, without shutting down its plant. It deemed it the better business policy to effect the arrangement stated and to rebuild and renovate its plant under this arrangement, with the maximum of economy.

It is noteworthy that the contract in question was entered into more than a year subsequent to the filing of the bill of complaint in this cause; that it existed for a period of but ten months and was terminated more than a year before the court heard the arguments in this cause.

The facts as above stated are found to be true by the report filed herein by the special master (appointed by agreement of the parties), who took the evidence and saw and heard the witnesses. (Rec., p. 53.)

During this ten months' contract between the two companies all of the gas manufactured by the complainant for the old company was delivered into the holder of the old company and was by the old company sent through the mains of the old company to its consumers. The new company manufactured the gas required for its own consumers, placed the same in its own holders and distributed the same to its consumers. It was stipulated in this ten months' contract that the complainant's servants should perform certain duties for the old company at the expense of the old company. The contract provided for a certain price for the gas so manufactured and delivered to the old company, with a deduction for leakage, and the contract shows upon its face that the stipulations as to duties to be performed by complainants' servants

were inserted for the protection of the complainant in order that it might determine the amount of gas lost through leakage or otherwise and might place a check upon such waste by having charge of the reading of meters and the repairing of breaks in the mains of the old company.

It is an astounding doctrine, if such be the law, that a complainant, who comes into court with clean hands, can by a temporary act of business accommodation (*performed more than a year after the pleadings have been settled—and fully completed and abandoned more than a year before the hearing of the cause*) be denied rights guaranteed to it by the Constitution of the United States and which have heretofore been accorded even to the vilest criminal at the bar.

If the contract in question were vicious and pertinent to the issues in the case, the doctrine of *locus poenitentiae* would apply. As a benign contract and wholly collateral to the issues, it can not properly be made an excuse for denying to complainant its constitutional rights.

THE COURT BELOW ERRED IN APPLYING THE LAW TO THE FACTS SO ERRONEOUSLY FOUND BY HIM.

Whether or not there be any basis in the record for the statements in the Court's opinion, even a casual examination of the record will disclose that the Court's findings are neither pertinent nor proper under the pleadings in this case.

It is a fundamental rule of law that the illegality of corporate acts can not be raised collaterally, especially when the action is not one to enforce the illegal agreement, and no rights are predicated upon it.

Rector v. *Hartford Deposit Co.*, 190 Ill., 387–388.

New Memphis Gas Light Co. v. *City of Memphis*, 72 Fed. Rep., 952.

Lafayette Bridge Co. v. *City of Streator*, 105 Fed. Rep., 729.

L. S. & M. S. Ry. Co. v. *Smith*, 173 U. S., 698.

Gilbert for use v. *American Surety Co.* (*C. C. A.*, 7th Circuit), 121 Fed., 494.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 450; 46 L. Ed., 679.

Macginnis v. *B. & M. Con. Co.* (Mont.), 75 Pac. 89.

Kinner v. *L. S. & M. S. Ry. Co.*, 69 Ohio St., 376.

Planters Bank v. *Union Bank*, 16 Wall., 483; 21 L. Ed., 473.

Strait v. *Nat. Harrow Co.* (C. C.), 51 Fed., 819.

Dennehy v. *McNulta*, 30 C. C. A., 422; 86 Fed., 825.

The Charles E. Wiswall Co. v. *Scott*, (C. C. A., 2nd Circuit), 86 Fed., 671.

National Folding Box and Paper Co. v. *Robertson*, (C. C.), 99 Fed. 985.

Harrison v. *Glucose Sugar Refining Co.*, 53 C. C. A., 484; 116 Fed., 304.

A fortiori, a collateral attack will not be permitted even under a special statute, if the statute is not pleaded or its

inhibition challenged by the issues in the case, especially where the remedy given by the statute is cumulative and differs from or is in addition to that given by the common law. Moreover, such defense must be set up by plea and not by answer.

Chicago & Alton Ry. Co. v. *Dillon*, 123 Ill., 570.

Haskins v. *Alcott*, 13 Ohio State, 210.

Denton v. *Moore's Administrator*, 2 Tenn., 168.

Neagle v. *Kelley*, 146 Ill., 465.

Chambers v. *Chambers*, 4 Gill. & Johnson's Rep. (Md.), 438.

New Jersey Patent Tunning Co. v. *Turner*, 14 N. J. Eq., 329.

Curtis v. *Mastin*, 11 Paige's Chancery Rep. 15.

Dyer v. *Lincoln*, 11 Vt., 301.

1 Daniel's Chancery Pleading and Practice, 5th Ed., 630.

Farley v. *Kittson*, 120 U. S., 303, and cases cited.

Sullivan v. *Portland, etc., R. R.*, 94 U. S., 806.

Dey v. *Dunham*, 2 Johnson Ch. (N. Y.), 182.

Crutcher v. *Trabue*, 5 Dana (Ky.), 82.

Hudson v. *Hudson's Admr.*, 6 Munford (Va.), 352.

Prince v. *Heylin*, 1 Atkins, 494.

The principle above contended for, except so far as the foregoing cases relate to formality in pleadings, has been upheld in numerous cases in which foreign corporations seeking to recover or protect their property have been met by the defense that they had violated or failed to

comply with the provisions of some local statute in compliance with which only would they have the right to do business in such State.

Smith v. *Little*, 67 Ind., 549.
St. L. etc. R. R. Co. v. *Fire Association of Philadelphia*, 60 Ark., 325.
Schlitz Brewery Co. v. *Ester*, 86 Hun (N. Y.), 22.
Delaware, etc., Telegraph & Telephone Co. v. *Pesauken Twp.*, 116 Fed., 910.

Such collateral attack is expressly forbidden in the Federal Courts since their jurisdiction is not conferred, and it can not be withdrawn or limited, by the legislation of the States.

Blodgett v. *Lanyon Zinc Co.*, 120 Fed., 893.

In this connection it is pertinent to observe that the record may be searched in vain to find a single specific reference to the Illinois Anti-Trust Statute of 1891, either in the pleadings, the evidence, the Master's report or the exceptions thereto.

It is also well established by the authorities that a defense must either be technically pleaded or the facts constituting such defense must be properly alleged and relied upon on the hearing of the cause in support of such defense.

Eyre v. *Potter*, 15 How. (U. S.), 42.
French v. *Shoemaker*, 14 Wall. (U. S.), 314.
Babbitt v. *Dotten*, 14 Fed., 19.
Spies v. *Chicago, etc., R. R. Co.*, 40 Fed., 34.
Britton v. *Brewster*, 2 Fed., 160.
Affirmed in 4 Fed., 808.
Price v. *Berrington*, 15 Jurist, 999.
7 Eng. L. & Eq., 254.

Wilde v. Gibson, 1 H. L. Cases, 605.
Ferraby v. *Hobson*, 2 Phillips, 255.
Curson v. *Belworthy*, 3 H. L. Cases, 742.
Connecticut Fire Ins. Co. v. *Kavanaugh*, 1892, A. C. 473.
Harrison v. *Guest*, 8 H. L. Cases, 481.
Hickson v. *Lombard*, 1 H. L. Cases, 324.
Tillinghast v. *Champlin*, 4 R. I., 173.
Fisher v. *Boody*, 1 Curtis (U. S.), 206.
Dashiell v. *Grosvenor*, 66 Fed., 334, affirmed in 162 U. S., 425, but not deciding this point.
Leighton v. *Grant*, 20 Minn., 345.

The Court should also note that the only evidence in the record upon which the Court might hang its finding of a violation of the anti-trust act was introduced in support of a distinct issue, which issue did not involve the Illinois anti-trust statue of 1891, but was the issue of estoppel. Moreover, the Court in its opinion specifically declined to consider the defense of estoppel.

In defendant's answer (Rec., 21) it is alleged that the complainant in obtaining its franchise ordinance had represented that it would compete with the old gas company in Peoria. The answer charges that these representations were violated, and avers (Rec., 26) "upon information and belief that *an agreement and understanding* now exists between said corporations that they will not compete for the sale of gas and that the price therefor shall be determined only upon mutual agreement. * * * Respondent charges that said agreement and combination was and is in direct violation of the representations and

agreements of said Peoria Gas and Electric Company with the citizens of said City of Peoria and the common council of said city when said ordinance was obtained."

It will be observed that the answer does not even charge complainant with any "*unlawful*" agreement or understanding, but merely makes the averment (upon which the court predicated his anti-trust decision) in support of the defendant's plea of estoppel—which plea of estoppel was fully considered by the master and disposed of in his report adversely to defendant. (Rec., pp. 50, 61.)

Even were it permissible to set up the Illinois Anti-Trust Statute of 1891 *collaterally, and even though such act had been specifically set forth in the answer, it would not have been a proper defense in this case.*

The only possible purpose for which a violation of the Illinois Anti-Trust Statute of 1891 might be urged would be:

(1) For the purpose of inflicting upon complainant the criminal penalties of the act.

(2) To show that complainant was a criminal under, the act.

The criminal penalties of the act could not be inflicted in this proceeding, and, though inflicted, would not constitute a defense in the case.

The Illinois Anti-Trust Act of 1891 (Starr & Curtis, Vol. 1, 2d edition, p. 1252) is as follows:

"An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evi-

dence in such cases. (Approved June 11th, 1891. In force July 1st, 1891. L. 1891, p. 206.)

"Pools, trusts and combines described. Sec. 1.

"*Be it enacted by the people of the State of Illinois, represented in the General Assembly.* If any corporation organized under the laws of this or any other State or country, for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act.

"2. Organization or combination and issue of trust certificates prohibited. Art. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in

the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

"3. Violations of act—penalty. Art. 3. If a corporation or a company, firm or association shall be found guilty of a violation of this act it shall be punished by a fine in any sum not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for the first offense, and for the second offense not less than two thousand dollars ($2,000) nor more than five thousand dollars (5,000), and for the third offense not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), and for every subsequent offense and conviction thereof shall be liable to a fine of fifteen thousand dollars ($15,000); provided, that in all cases under this act either party shall have the right of trial by jury.

"4. Officer, agent or receiver of corporation, individual, etc., violating act. Art. 4. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any member of any company, firm or association, or any individual found guilty of a violation of the first section of this act may be punished by a fine of not less than two hundred dollars ($200), nor to exceed one thousand dollars ($1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had.

"5. Contracts, etc., violative of act, void. Art. 5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"6. Purchasers of product or manufacture violating

act discharged from payment. Art. 6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

"7. Fines—recovery. Art. 7. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of the State of Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in Section 3, the jury shall find for the people, and that the defendant has been before convicted of a violation of the provision of this act, they shall return such finding with their verdict, stating the number of times they find defendant so convicted, and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3; provided, that in all cases under the provisions of this act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people."

It is apparent on the face of the act that its penal provisions are enforceable only by the State through its judicial department.

The defenses sanctioned by the act are especially enumerated, and do not include the idea of relief in an action such as the one at bar.

An examination of the bill of complaint discloses that complainant does not seek relief under any contract prohibited by the Illinois anti-trust act; that is to say, the complainant does not attempt to enforce any rights predicated upon the alleged combination.

Moreover, section 6 of the act, if violated by complainant, would be available for defense only in case of a consumer of gas being sued by complainant for the price thereof; and, even in such a case, the consumer could not fix the price he would pay. It would be the contract price or nothing.

If complainant had violated the Illinois Anti-Trust Law of 1891, or any other criminal statute, such fact would not bar the rights of complainant in this suit.

The contrary has long since been set at rest by decisions in this very circuit.

Gilbert v. *American Surety Co.*, 121 Fed., 494.

Star Brewery Co. v. *United Breweries Co.*, 121 Fed., 713.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540,

and by the following cases:

Armstrong v. *American Exch. Bank*, 133 U. S., 433.

Planters' Bank v. *Union Bank*, 16 Wall., 483.

Armstrong v. *Toler*, 11 Wheat. (U. S.), 258.

Brooks v. *Martin*, 2 Wall. (U. S.), 70.

Sharp v. *Taylor*, 2 Phillips' Ch., 801.

McBlain v. *Gibbs*, 17 How. (U. S.), 232.

In the absence of a finding in a direct proceeding that complainant had violated the Illinois Anti-Trust Act of 1891, the position taken by the court below amounts at most to a charge that complainant being deemed by the court to be a criminal, does not come into court with "clean hands," and, therefore, is not entitled to equitable relief.

The doctrine that "he who comes into equity must come with clean hands" is subject to well-defined limitations, and under the limitations of that doctrine the maxim is not applicable to the facts in this case, because

a. The illegal acts charged in the court's opinion are not connected with the matter in litigation so that they in any manner affect the equitable relations subsisting between the two parties at the time the suit was commenced, and,

b. All of such acts, except the circumstance of the change of price on August 1, 1900, took place after the commencement of the suit.

Moreover, the maxim above noted is always confined to misconduct in regard to or at all events connected with the matter in litigation, so that it in some measure affects the equitable relations subsisting between the two parties and arising out of the transaction. When a court of equity is appealed to for relief, it will not go outside of the subject matter of the controversy and make its interference depend upon the conduct of the moving party as to matters in no way affecting the equitable right which he asserts against the defendant or the relief which he demands.

Pomeroy's Equity Jurisprudence, sec. 399.

Lewis Appeal, 67 Penna. St., 166.

Woodward v. *Woodward*, 41 N. J. Eq., 224.

Liverpool & London, etc., Ins. Co. et al. v. *Clunie* (C. C. Cal.), 88 Fed., 160.

Bateman v. *Fargarson* (C. C. Tenn.), 4th Fed., 32.

City of Chicago v. *Union Stockyards Co.*, 164 Ill., 224.

Trice v. *Comstock*, 121 Fed., 620.

National Folding Box Co. v. *Robertson* (C. C. Conn.) 99 Fed., 985.

Bonsack Machine Co. v. *Smith*, (C. C. N. C.) 70 Fed., 383.

Coeur D'Alene, &c., Mining Co. v. *Miners Union* (C. C. A. Idaho) 51 Fed., 260.

The Charles E. Wiswell (C. C. A., 2d Cir.) 86 Fed., 671.

Knapp v. *Jarvis Adams Co.* (C. C. A., 6th Cir.) 135 Fed., 1,008.

Harrison v. *Glucose Sugar Ref. Co.* (C. C. A., 7th Cir.) 116 Fed., 304.

Yale Gas Stove Co. v. *Wilcox*, 64 Conn., 101.

Delaware Surety Co. v. *Layton*, (Del. 1901) 50 St. 378.

Deering v. *Earl of Winchelsea*, 1 Cox, Ch. 318.

Barton v. *Mulvane*, 59 Kan. 314.

Kinner v. *L. S. & M. S. Ry. Co.* 69 Ohio, St. 339.

Foster v. *Winchester*, 92 Ala., 497.

Wiley National Wall Paper Co., 70 Ill. App., 543.

It is enough, we submit, that the Illinois Anti-Trust Act of 1891 permits the purchaser of goods to retain the commodity and refuse payment therefor, under a strict enforcement of said penal statute. And this Court will not extend the scope of said penal statute under such circumstances,—because Federal Courts have repeatedly held that it is not "public policy," but, rather, "public scandal," to uphold a dishonest act, and to permit a litigant to present a dishonest defense.

Gilbert, use etc., v. *American Surety Co.*, 121 Fed. 499.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 540.

Dennehy v. *McNulta*, 86 Fed., 827.

Lafayette Bridge Co. v. *City of Streator*, 105 Fed., 792.

and other cases cited by Judge Jenkins in the Gilbert Case *supra*, at page 503.

And in enforcing a statute of this character the Federal Court is not bound to follow the decisions of the State Courts, but in determining whether or not such provisions are contrary to the general law or public policy or the Federal Constitution, it willl make and follow its own decisions.

Jefferson Bridge Co. v. *Skelly*, 66 U. S., 436.

United States ex rel Butz v. *City of Muscatine*, 75 U. S., 575.

Wright v. *Nagle*, 101 U. S., 791.

L. N. R. R. Co. v. *Palms*, 109 U. S., 244.

Scott v. *McNeal*, 154 U. S., 34.

Gormley v. *Clark*, 134 U. S., 338.

Ex parte Tyler, 149 U. S., 187.

IV.

CONSIDERATION OF THE MERITS OF THE CASE.

As heretofore stated, the bill of complaint presented the following issues:

The maximum price ordinance of 1900 was alleged

to be in contravention of the Constitution of the United States, in that—

a. Its operation would impair the obligations of the franchise contract of complainant with the City of Peoria.

b. Its enforcement would result in confiscating the property of complainant and taking its property without due process of law and without just compensation, and in denying to complainant the equal protection of the law.

The defendant accepted the issue tendered, and in addition presented the following issue for a defense, to wit: That complainant was estopped from invoking the protection of the Constitution of the United States.

In so far as the validity of the ordinance complained of turned upon its unreasonableness, the complainant sought to establish its position by presenting evidence with respect to the cost of manufacturing and distributing gas, and it conceived that the proper elements to be taken into consideration in determining such cost, were:

1. The cost of a suitable plant.

2. Actual cost of the manufacture and delivery of gas per thousand cubic feet, exclusive of depreciation and interest on the investment.

a. The cost of raw material from which gas is manufactured.

b. The cost of labor involved in the manufacture of gas.

c. The cost of distributing gas when manufactured.

d. The cost of administration, repairs and maintenance.

e. Allowance for the value of residuals produced.

3. The losses occasioned by depreciation.

4. The hazards of the business.

5. The requirements for an adequate return on moneys actually invested.

1. *The cost of a suitable plant:* Complainant, in support of the inquiry as what would be the proper cost of a manufacturing plant and distributing system suitable for carrying on its business, introduced evidence showing the actual cost of complainant's plant. This plant was new and vouchers were introduced covering every dollar expended in the construction of the plant, and amounting to $434, 252.35. (Rec., 164, 349.) Expert gas engineers and contractors were placed upon the stand and testified:

a. That the *cost* of complainant's plant was in fact less than would ordinarily be required in the construction of a similar plant, owing to the fact that it was built under favorable conditions both as to the price of labor and materials.

b. That the *fair market value* of complainant's plant at the time of the filing of the bill of complaint was in excess of $450,000, exclusive of any value contained in its franchise.

c. That complainant's plant was admirably adapted for complainant's business, and was of proper size and modern in every detail.

2. *Actual cost of the manufacture and delivery of gas per thousand cubic feet exclusive of depreciation and interest on the investment.*

Upon the question of cost of manufacture and delivery of gas, the defendant introduced its operating statements (Rec. 350–353 and 667–691) from the date of the completion of the plant up to the time of the filing of the bill of complaint, and also from the time of filing the bill of complaint to the date of the closing of evidence in this case. These operating statements accompanied in every case, by the detail vouchers, showed the actual cost of every material entering into the production of gas, the actual cost of labor employed, the actual amount of gas produced, the actual amount of residuals obtained, and the price at which the residuals were sold, thus enabling the master to compute with absolute accuracy the actual cost of every foot of gas produced.

In addition to this, the complainant presented the testimony of experts in the manufacture of gas and the management of gas plants, and demonstrated that the results achieved in the operation of complainant's plant were of the highest order, both as to quantity, quality and economy of production.

3. *The losses caused by depreciation.*

In treating the subject of depreciation the complainant produced expert testimony showing that depreciation is an element of expense entirely distinct from repairs and maintenance, and is occasioned by the following elements and forces.

a. Natural destruction occasioned by the action of the elements, including natural wear and tear.

b. Special destruction occasioned by the disintegrating chemical vapors about a gas plant.

c. Antiquation, resulting from the fact that new improvements and inventions, require the replacement of apparatus as a measure of economy and to avoid the introduction of competition.

d. Arbitrary changes of grade by city councils requiring the system of mains to be either lowered or raised at various points, or abandoned.

e. Shifting of residence and business localities requiring, *e. g.*, a four inch main to be replaced by a sixteen inch main, or putting the work of a four inch main on a sixteen inch main.

f. Damage to the system of mains by street improvements, such as the building of sewers, the laying of water pipes, and other occupation of the streets.

g. The necessity of remodeling or abandoning and rebuilding an entire plant to meet the increasing requirements of a growing city from time to time.

Upon the question of depreciation, it appeared that the annual charge required to meet the same would average about six and one-half per cent.

4. *The hazards of the business and the proper interests return in view thereof.*

Upon the hazards of the business like testimony was introduced showing the difference in risk between an investment in real estate securities or other like collaterals

and an investment in a manufacturing industry, and especially a gas plant. It was urged by complainant, and supported by the testimony, that inasmuch as complainant was asking for an adequate return not upon its capital stock nor upon any bond issue, nor upon any amount of indebtedness which might exist, but merely upon the actual money invested, to wit, the actual cash which would be required to reproduce its investment at the time of the passage of the ordinance in question, it was fitting that the hazards of the business should be considered in determining what would be an adequate income to be derived from the moneys invested.

Among the hazards taken into account by the various expert witnesses may be mentioned the following:

a. Competition of other forms of light and heat, including natural gas.

b. Explosions, asphyxiation, and similar accidents peculiar to the business.

c. New inventions, revolutionary in character, which destroy the value of the property, as distinguished from mere antiquation.

d. Hazards occasioned by city government changing its public lighting system from gas to electricity, or otherwise resulting in the absolute destruction of the investment, represented by the entire public lighting system.

e. Electrolysis, *i. e.*, the destruction of mains through the action of vagrant electric currents from electric street railroad systems, &c.

f. Permanent and fixed character of the investment and limited field of operation preventing the removal of the "stock in trade" to more favorable localities.

g. Immense capital invested as compared with the receipts of the business.

h. Ill-advised municipal and state legislation.

The concensus of opinion among the witnesses established the proposition that if ordinary real estate mortgages secured upon income-bearing property, having a value of twice the amount of the loan, having a varied use and carrying adequate insurance, called for the return of from four to six per cent. upon the moneys invested therein, it must follow that an investment in a gas property containing no margin of security and subject to peculiar hazards should bring a return of from eight to ten per cent. upon the moneys therein actually invested.

The Report of the Special Commissioner fully Sustains the Contentions of Complainant on all Points Necessary to the Relief Sought, and such Report Should be Confirmed without Remanding the Cause.

The gist of the Special Commissioner's Report is as follows:

(1) The maximum rate ordinance was passed under State authority.

(2) The maximum rate fixed by the ordinance was so unreasonably low that the enforcement of the ordinance

would result in the taking of complainant's property for public use without just compensation and without due process of law, and in denying to complainant the equal protection of the law.

(3) That, therefore, the maximum price ordinance was void, and complainant was entitled to the relief sought by the bill, and that "an injunction should be allowed, perpetually enjoining the defendant, its officers and agents from enforcing, or attempting to enforce, the provisions thereof against complainant, as prayed in and by its bill herein." (Rec., p. 62.)

It will be observed that the decree of the court below did not overrule or modify the findings of the Special Commissioner in regard to any matters pertinent to the relief sought by complainant. It is, therefore, respectfully submitted that the findings of fact and law made by the Special Commissioner stand to the same extent as if recited in the final decree of the court below; and when the ground upon which the court below denied equitable relief fails, the report of the Special Commissioner remains as the judgment of the court in this cause. This view is entitled to unusual consideration, inasmuch as the Special Commissioner was appointed by agreement of the parties—the effect of which circumstance is discussed in this brief at page 72 *post*.

Moreover, all of the exceptions filed by the defense are general in their character, and none of them are supported by special statements of the Commissioner, or by reference to the evidence bearing on the exceptions relied upon by defendant.

Exceptions are to be regarded only so far as they are supported by the special statements of the Commissioner or by a reference to the particular testimony on which the exceptant relies.

Harding v. *Handy*, 11 Wheaton, 103–126.
Jaffrey et al. v. *Brown* (C. C. Ga.), 29 Fed., 476.
Green v. *Bishop*, 1 Clifford, 186.
Bridges v. *Sheldon*, 18 Blatchford, 295–307.
Lockhart v. *Horne*, 3 Woods, 542.

Believing, therefore, that the master's report should be approved, it is desirable to present for the consideration of this court—

THE FINDINGS OF FACT MADE BY THE SPECIAL MASTER.

The findings of the special commissioner upon the facts may be summarized as follows:

1. That complainant constructed a gas plant in a suitable locality and laid twenty-six and one-half miles of mains for distribution of gas, and commenced distribution about May 1, 1900. (Rec., p. 46.)

2. That at the time of the institution of this suit it had installed about two thousand service pipes and had in use 1,758 meters—these service pipes being installed and the meters set without charge to consumers. (Rec., p. 47.)

3. That the actual cost of complainant's plant and distributing system was $434,252.35 (Rec., p. 47.)

4. That the plant so constructed was well designed

for the prudent and economical manufacture of coal gas, and represented the highest efficiency, not only for the economical production of gas, but also for the production of the valuable by-products known as coke, coal tar and ammonia liquor, the sale of which tends to reduce the net cost of the manufacture of coal gas. (Rec., p. 47.)

5. That up to the time that complainant secured its charter from the State, the prices fixed by the old gas company were, for illuminating gas, $1.35 gross, or $1.25 net per thousand cubic feet if paid on or before the 10th day of the month next following and 75 cents net per thousand cubic feet for fuel gas. (Rec., p. 47.)

6. The cost of the production of coal gas can not be ascertained by any fixed standard; the cost of raw materials necessary to its production are variable. Necessary labor in the successful operation of complainant's plant including its distributing system and also its manufacturing plant, have no fixed, invariable scale. The market value of residuals obtained is likewise an uncertain feature (Rec., p. 51.)

7. Depreciation exists and continues in a coal gas plant notwithstanding repairs that are necessary to be made to maintain its working efficiency, and it is an expense in the cost of the manufacture and distribution of gas that is outside of and in addition to repair expenses. (Rec., p. 52.) "The depreciation of a manufacturing coal gas plant, under the evidence in this case, may be conservatively found to be five per cent. per annum on the first cost." (Rec., p. 51.)

8. Commissioner's finding number 17 (Rec., p. 52):

"The first cost to complainant in the manufacture and distribution of coal gas in the City of Peoria may be said to be covered by the following charges, viz :

Interest at the rate of five (5) per cent. per annum on the cost of its manufacturing plant and distributing system, which at the close of the taking of testimony in this case was $439,725. This sum represents its fair market value, and only the money then invested therein by complainant; also depreciation at the rate of five (5) per cent. per annum on the cost of the manufacturing plant less the price paid for the real estate on which it is located; five (5) per cent. per annum depreciation on the cost of the service connections installed; nine (9) per cent. per annum depreciation on the cost of consumers' meters; five (5) per cent. per annum depreciation on the amount invested in tools, furniture and fixtures; two (2) per cent. per annum depreciation on the cost of distributing mains; also the cost of the material used; necessary labor; repairs to system; leakage or unaccounted for gas as shown by the difference of registration in the station meter register and consumers' meters; uncollectible accounts, taxes and office expenses."

Commissioner's finding 18. (Rec., p 52.):

"From the cost as so ascertained should be deducted the value of residuals obtained from each ton of gas coal carbonized."

In the presentation of its case before the special commissioner, complainant was somewhat embarrassed from

the fact that in none of the so-called rate cases in which legislatures or municipalities had fixed maximum rates to be charged by railroads, street railroads, gas or water companies, were the various elements of a reasonable rate so organized as to permit the classification of such cases with reference to any particular element of cost. The last mentioned findings of fact involve the consideration of the law under which the federal courts have heretofore acted in determining upon the reasonableness of rates in the cases before them. Some of the cases which follow include a discussion of the reasonableness of the rates generally, while others include several of the elements of cost as we have classified them. The following cases taken together, we respectfully submit, are a sufficient warrant for this finding of the special commissioner.

Smith v. *Ames*, 169 U. S., 466.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S., 362.

New Memphis Gas Co. v. *City of Memphis*, 72 Fed., 952.

Clyde v. Richmond & Danville Ry. Co., 57 Fed., 436.

Covington & Lexington Turnpike Road Co. v. *Sandford*, 164 U. S., 578.

So. Pacific Co. v. *Board of Railroad Commissioners of Cal.*, 78 Fed., 236.

San Diego Land and Town Co. v. *National City*, 74 Fed., 79.

Milwaukee Electric Ry. & Light Co. v. *Milwaukee*, 87 Fed., 577.

Bryner, et. al. v. *Butler Water Co.*, 179 Pa., 231; 36 L. R. A., 260.

San Diego Water Co. v. *City of San Diego* (Cal.), 38 L. R. A., 460.

together with the numerous cases cited in this brief, pp. 19, 20, where the question is discussed as to the impairment of contract obligations and the confiscation of property through unreasonable regulation.

9. The gas manufactured by complainant from September 1, 1900 (the date of the maximum price ordinance), up to September 1, 1901, as shown by the evidence, cost the complainant in the holder, per thousand cubic feet, 77 9-10 cents after deducting from the cost of production, the market value of all residuals obtained from the coal carbonized. The cost was upon the basis of an output of about fifty-one million cubic feet per year, and does not include the cost of distribution (Rec., p. 53) nor depreciation; nor the hazards of the business; nor interest on the investment.

10. It appears from the evidence that complainant company is capitalized at two million dollars, on no part of which have the holders of its stock ever received any dividends whatever, nor have any been declared by its managing board. The salaries of its officers do not seem to be extravagant or in excess of the amount usually paid by others engaged in like business enterprises; the vice-president of the company, being also its active business manager. Its working capital, comprised of its bills receivable and cash on hand is not in excess of the

amount required to enable it to take advantage of favorable market prices for the material entering into the production of coal gas. *It is not seeking in this case the right to charge for gas a price that will enable it to pay dividends on its capital stock.* (Rec., p. 55.)

11. Commissioners' Finding 26 (Rec., p. 55.):

> *"At the close of the taking of the evidence in this cause complainant's manufacturing plant and distributing system were in a high state of working efficiency as regards the economical manufacture and distribution of coal gas; the management of its affairs, skillful and prudent; yet notwithstanding these favoring conditions, it is conclusively shown by the decided weight of the evidence, that the income it would receive from the sale of gas as shown by consumers' meters in use, at the rate of seventy-five cents per thousand cubic feet, together with the market value of all residuals produced per ton of coal carbonized, will not yield an income sufficient to meet the amount of actual depreciation to its plant, the expenses incident to the making of necessary repairs thereto, and a normal interest charge on the amount of money invested in such plant."*

And it will be observed that the commissioner refused to consider the item of "hazards of the business" in arriving at a normal interest charge (Rec., p. 55).

A Further Unreasonable Provision of the Ordinance.

It was contended by complainant in its bill of complaint that the provision of the maximum price ordinance requiring complainant to furnish gas of eighteen candle power at the *place of consumption* was unreasonable and impossible of performance.

Upon this contention, supported by the evidence, the commissioner made the following finding:

Commissioner's finding 12 (Rec., p. 51):

> "The license granted by the defendant, the City of Peoria, on April 18, 1899, contains no requirements as to the candle power of gas to be furnished by complainant, neither is it practicable under the present method of conveying gas from the place of manufacture to a point of consumption to maintain eighteen candle illuminating power at all points of consumption without the excessive use of enrichers in its manufacture. Where this is attempted by the producer it results in discomfiture to the consumer by smoking when ignited and the giving off of unpleasant odors."

The Arbitrary and Ill-considered Action of the City Council in Passing the Ordinance.

Upon the question of the good faith of the City Council in passing the maximum-rate ordinance, the master found (Findings of Fact, No. 11, Rec., p. 50).

> "The ordinance in controversy in this case was not passed by the Common Council of the City of Peoria for about eighteen months after the time that complainant procured its original license from the city. At the time the ordinance fixing the maximum price of gas was pending, and before its adoption by the City Council, it appears complainant, through one of its officers, stated to the Mayor of Peoria and to some of the members of the City Council that gas could not be made by it at the maximum price fixed by this ordinance, and the Mayor was then requested either personally or through any representative of

the city he might select to make an examination of the books of the complainant to ascertain, for the guidance of the council, what it was then costing complainant to manufacture gas, and what would be the probable cost in the future. *There is no evidence in the record in this case showing or attempting to show that the defendant ever sought the opportunity or privilege of making any investigation of complainant's books that had been offered it for the express purpose of guiding its legislative body in fixing in the ordinance it then had under consideration reasonable and fair rates to be charged for gas in the city.* Nor is there one word of testimony in denial that such an opportunity was tendered it by the complainant, nor is there any evidence that defendant had knowledge on this subject from any other source."

The foregoing conclusion gives an added touch of viciousness to the ordinance, it being the law that the city must exercise its right to regulate rates, *not arbitrarily, but intelligently*, and after due investigation.

Milwaukee Electric Railway & Light Co. v. *City of Milwaukee*, 87 Fed., 577.

Mercantile Trust Co. v. *Texas Pacific R. R. Co., et al.*, 51 Fed., 529.

New Memphis Gaslight Co. v. *City of Memphis*, 72 Fed., 952.

The Defense of the City Based on Estoppel.

The answer of defendant contains sundry averments that complainant had secured its franchise ordinance by making false representations to the City Council.

While the decree of the Court specifically excludes any consideration of this defense, it is now proper to advert to it in the consideration of the general merits of the case.

Upon the issue of estoppel the evidence shows—

First. That the alleged representations were not made by the complainant company.

Second. That such representations were not authorized by any corporate action of the complainant company.

Third. That all the representations in question were made prior to the time of the adoption of the franchise ordinance and became merged therein.

Fourth. That such representations, not being incorporated in the franchise ordinance, could not have been a controlling consideration in the passage of the same.

Upon this issue the master found (Rec., p. 49):

> "It does not appear, however, that any corporate action taken at any time by complainant authorized such statements or representations, nor does it appear that in any such statements or representations any fixed rate at which complainant would furnish gas to consumers was stated, the substance of them being that 'the price would be cheapened.'"

The Master's Finding of Law 23 (Rec., p. 61).

> "Under the facts as found, the estoppel set up by the defendant can not be sustained. If the rate fixed by the ordinance of September 4, 1900 had been prescribed in the original license to complainant, a question much more difficult to a correct decision in that regard would be presented."

The doctrine of estoppel can not be invoked in this case without doing violence to fundamental principles governing the binding force of corporate acts and destroying the elementary principles which uphold the binding force of written contracts.

Garlinghouse v. *Whitwell*, 51 Barbour, 208,
Hurt v. *Riffle*, 11 Fed. Rep., 790.
Union Mutual Life Ins. Co. v. *Slee*, 123 Ill., 57.
Chandler v. *White*, 84 Ill., 438.
Hill v. *Epley*, 31 Penn. State, 331.
Davidson v. *Young*, 38 Ill., 152.
Mason v. *Harper's Ferry Bridge Co.*, 28 W. Va., 649.
Lash v. *Rendell*, 72 Ind., 475.
Stoddard v. *Johnson*, 75 Ind., 20.
Plinner v. *Lord*, 9 Allen, 455.

So far as we have been able to find, no court has ever held that mere considerations of opinion could create an estoppel; nor have expressions made in good faith been held to create an estoppel where the party invoking the doctrine was in a position to secure information upon which to base an independent judgment, and where the party making the representations did not do so in the form of a guaranty.

It was entirely within the power of the City Council of the City of Peoria to have inserted maximum rates in the franchise ordinance in accordance with the alleged representations of individual stockholders. If it relied on the alleged representations and at that time placed upon them the same

construction for which it now contends, it is fair to presume that the City Council would have embodied the maximum rate in the ordinance. The franchise ordinance is a contract and merges all negotiations and represents the final conclusions of the parties thereto, and it is a fair presumption that when the franchise ordinance was passed in its existing form, both parties were content that the question of the rate to be charged either be left to the operation of natural laws, or if regulations were attempted that the rate fixed would be a reasonable one after due investigation and according to law.

This principle applied fundamentally to written contracts in general (*i. e.*, that their effect may not be varied by parol evidence, but that all negotiations are presumed to be merged in the contract itself), is applied also to *ordinance contracts.*

Curtiss v. *City of Waterloo*, 38 Iowa, 266.

Commissioners v. *Hunt*, 33 Ohio St., 169.

Bridges et al. v. *Board of Supervisors*, 56 Miss., 817.

Nor was it proper or legitimate for the court, over the specific objections of complainant, to inquire into the motives which induced the city council to pass the ordinance.

Farmers Loan & Trust Co. v. *C. P. & S. Ry. Co.*, 39 Fed., 143, 153–156.

That a corporation can not be estopped by the unauthorized representations of the stockholders is apparent from the following cases:

American Preservers Co. v. *Norris*, 43 Fed., 711.

Davis Wagon Wheel Co. v. *Davis Wrought Iron Wheel Co.*, 20 Fed., 700.

Moore & Handley Hardware Co. v. *Towers Hardware Co.* (Ala.), 6 So., 41–43.

Bartlett v. *Kinsley*, 15 Conn., 327.

Jones v. *Williams* (Mo.), 39 S. W., 489.

Moreover, if this question of estoppel should be deemed material to a decision of the case, the record discloses that the representations upon which the estoppel is based were not false or fraudulent, but were carried out in good faith.

(Record pp. 781, 819, 820, 872, 887, 918, 992, 998, 1041, 1055, 1070, 1090, 1091.)

THE COMMISSIONER'S CONCLUSIONS OF LAW.

The principal conclusions of law of the special commissioner (not already discussed) and the authorities in support of the same now follow:

1. The commissioner states the main question before him as follows: (Second conclusion of law, Rec., p. 57.)

> "In this case the following federal question is presented,—does the ordinance adopted by the defendant on September 4, 1900, in and by which the maximum price to be charged for gas in the City of Peoria is fixed, violate the provisions of the Constition of the United States wherein it provides that no person shall be deprived of his property without due process of law, and further, that private property shall not be taken for public use without just compensation?"

2. The commissioner's answer to this question is found in the sixth conclusion of law (Rec., p. 58), and the eighteenth conclusion of law (Rec., p. 60).

> "6. The fact being established that complainant can not manufacture and distribute gas to the citizens of Peoria at the maximum rate fixed by the ordinance, it then follows that:
>
> a. The ordinance is void because by it the city has gone beyond the powers conferred by the laws of the State of Illinois which confer upon it the power to regulate the price to be charged for gas. It constitutes the exercise of a lawful right in an unreasonable manner; and
>
> b. The enforcement of the ordinance requiring complainant to furnish gas to the citizens of Peoria at the point of consumption at the maximum price therein fixed would constitute the taking of private property for public use without just compensation, and in that respect is in violation of the provisions of the Constitution of the United States.
>
> "18. *The evidence in this regard shows that the maximum rate fixed by the above ordinance is so unreasonably low as to require the complainant to furnish gas to the citizens of Peoria at a price below the cost of manufacturing and distributing it. The enforcement of it would constitute the taking of the property for public use without just compensation. This is prohibited by the fourteenth* (14) *amendment to the Federal Constitution.*"

These conclusions of the commissioner find ample support in the following cases, in many of which it is submitted the evidence was far less conclusive of the threatened injury to complainant's property and property rights than in the case at bar.

Indianapolis Gas Co. v. *City of Indianapolis*, 82 Fed., 245.

Citizens Street Railway v. *City Railway Co.*, 56 Fed., 746.

Same case affirmed in Supreme Court, 166 U. S., 557.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

Mercantile Trust & Deposit Co. v. *Collins Park and Belt R. R. Co.*, 99 Fed., 812.

Southwestern Missouri Light Co. v. *City of Joplin*, 101 Fed. 23.

C. M. & St. P. Ry. v. *Minnesota*, 134 U. S., 460.

Haverhill Gas Light Co. v. *Barker*, 109 Fed., 694.

Cleveland Gas Light & Coke Co. v. *The City of Cleveland*, 71 Fed. Rep., 610.

3. That the question of the reasonableness of such ordinance and as to whether the limitations are reasonable or unreasonable as between the public and a public service corporation, are ultimately questions for judicial, not legislative determination. (Master's finding 15, Rec., pp. 59–60.)

Stone v. *Trust Co.*, 116 U. S., 307.

C. & N. W. Ry. Co. v. *Dey*, 35 Fed., 866.

Clyde et al. v, *R. & D. Ry. Co.*, 57 Fed., 436.

The Findings of the Special Commissioner Appointed by Agreement of the Parties are Entitled to Peculiar Weight.

The Special Commissioner in this case was appointed under stipulation and by consent of both parties. Such a consent, entered as an order of Court, is "a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject indeed, to be reviewed under the reservation contained in the consent and order of the Court, when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise."

Kimberly v. *Arms*, 129 U. S., 512, 523–525,

Farrer v. *Bernham*, (Cir. Ct. of App. 5th Cir.) 75 Fed. 136.

Trustees Dartmouth College v. *International Paper Co.*, 132 Fed., 91.

Davies v. *Schwartz*, 155 U. S., 631.

Third Nat. Bank v. *Nat. Bank.* (C. C. A., 5th Circ.), 86 Fed Rep., 852.

The Elton. (C. C. A., 4th Circ.), 83 Fed. Rep., 519.

Walker v. *Kinnare.* (C. C. A., 7th Circ.), 76 Fed. Rep., 101.

Moline Plow Co. v. *Carson.* (C. C. A., 8th Circ.), 72 Fed. Rep., 387.

Phœnix Furniture Co. v. *Put-in-Bay Hotel Co.* (C. C. for N. D. of Ohio), 66 Fed. Rep., 683.

The order of court, submitting this case to the special master, for his determination, was as follows:

> "Now come the parties, by their solicitors, and by agreement, in open court, it is hereby ordered that I. C. Pinckney, of the City of Peoria, in said district and division, be and he is hereby appointed a special commissioner to take the proofs herein and report the same, with his findings and conclusions herein, with all convenient speed." (Rec., p. 38.)

In *Kimberly* v. *Arms, supra*, the court says:

> "When the parties consent to a reference of a case to a master or other officer, to hear and decide all the issues therein and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent, and his determinations are not subject to be set aside and disregarded at the mere discretion of the court: A reference, by consent of parties, of an entire case, for the determination of all its issues, though not strictly a submission of the controversy to arbitration (a proceeding which is governed by special rules), is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law.
>
> 'To disregard the findings and treat the report as, a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties. We are, therefore, constrained to hold that the learned court below failed to give to the findings of the

master the weight to which they were entitled, and that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of evidence upon which they were made."

In *Davies* v. *Schwartz*, *supra*, the Court says:

"While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court."

CONCLUSION.

We can not impress upon the court too strongly the position in which the complainant will be most unfairly and unjustly placed in the event of an affirmance of the decree below without any decision as to the validity of the maximum rate ordinance. The circuit court compelled complainant as a condition precedent to appeal to file a bond for $150,000 conditioned "that if the said complainant shall not prosecute its appeal with effect and make its plea good, then the said complainant shall well and truly pay and refund to the said City of Peoria for the use of such of the inhabitants thereof as are con-

sumers of gas furnished by the said Peoria Gas and Electric Company, complainant, all excess, over seventy-five cents per thousand cubic feet charged and collected by said complainant from such consumers and all damages that may accrue to said city and said consumers of gas by reason of the restraining order heretofore entered and continued in said cause by reason of the appeal herein." (Rec., p. 143.)

If the complainant is to be denied equitable relief, it will follow that the city can claim the forfeit of the bond, notwithstanding the fact that the special commissioner appointed by agreement of the parties has declared the ordinance unreasonable, unconstitutional and wholly void.

Nor in such event can this complainant ever find a *locus poenitentiæ*, for this record shows that every act upon which the Court below based its finding of combination had ceased to exist at the time of the closing of the evidence in the case, it appearing (Record, pages 1353 and 1717) that even the alleged agreement as to rates did not continue for more than four months after the filing of the bill. The complainant can not, therefore, further purge itseif of its alleged offenses.

Moreover, by reason of the nature of its business, it can not remove its stock in trade to a more friendly locality, and, being a public-service corporation, it will not be permitted voluntarily to go out of business—this very ordinance requires it to exercise its franchise at the bidding of the public, and prescribes exorbitant penalties for each and every refusal on its part to furnish gas at the prescribed rate upon request.

An affirmance of the decree, therefore, would mean that this corporation, unable further to purge itself of the criticism of the Court below, handicapped by the utter impracticability of removing its property, denied the right of going out of business, and beset by conditions which the special commissioner declared meant financial ruin, must continue to operate its plant until such time as its property, valued at $500,000, has been dissipated or its affairs wound up through the merciful intervention of a receiver in bankruptcy.

For the foregoing reasons, it is submitted that the decree of the court below should be reversed, and that this court should enter a decree in accordance with the special commissioner's report or should remand the case, with instructions to the court below to enter such a decree.

E. C. RITSHER,
W. T. IRWIN,
W. T. ABBOTT,
Of Counsel for Appellant.

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Clerk.

(19367)

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY,
Appellant,

vs.

THE CITY OF PEORIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Suggestions by Complainant in Regard to Petition of City of Chicago for Leave to File Brief.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Referring to the petition of the City of Chicago for leave to file a brief in this cause, it is suggested that—

1. The question argued in petitioner's brief is admittedly unnecessary to a decision of the case now be-

fore the Court. The fear that this Court in its opinion herein may commit itself upon a question involved in another suit is, therefore, groundless.

2. The question which petitioner presents appears to be vital to a proper decision of the case of Darius O. Mills *vs.* City of Chicago *et al.* It, therefore, can best be considered in the orderly hearing of that case.

3. The suit of Darius O. Mills *vs.* City of Chicago *et al.* is not pending in this Court, and there is no certainty that said suit will ever be docketed in this Court.

Respectfully submitted,

E. C. RITSHER,
W. T. IRWIN,
W. T. ABBOTT,
Of Counsel for Complainant.

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Suggestions by Complainant in Regard to Petition of Darius O. Mills for Leave to File Brief.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

It would be presumptuous for complainant to object to the filing of a brief by one who comes as *amicus curiæ*. It may pertinently be observed, however, that

1. The question sought to be raised by petitioner's brief is admittedly unnecessary to a decision of the case

before the Court. The argument of the question, therefore, will not aid the Court in determining the issues in this case. Hence, "petitioner is apprehensive" that the authorities in support thereof "may not otherwise (than by petitioner's brief) be called to the attention of the Court."

2. The suit of Darius O. Mills *vs.* The City of Chicago *et al.*, is not pending in this Court, and as it appears that the question of appeal lies not with Darius O. Mills but with the City of Chicago, petitioner is unable to assure the Court that said suit will ever be docketed in this Court.

3. The manifest fear of Mr. Mills that this Court may commit itself upon a question involved in another suit is groundless. Should this Court indulge in an *obiter dictum* in the opinion filed in this case, the Court has no such pride of opinion as to be bound thereby should the question in which petitioner is interested come before it in due course.

Respectfully submitted,

E. C. RITSHER,
W. T. IRWIN,
W. T. ABBOTT,
Of Counsel for Complainant.